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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re TAYLOR D., a Person Coming Under
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

TAMMY D.,

Defendant and Appellant.

D054282

(Super. Ct. No. SJ011701)

APPEAL from orders of the Superior Court of San Diego County, Garry G.

Haehnle, Judge. Affirmed.

Tammy D. appeals an order denying her petition under Welfare and Institutions Code¹ section 388 in which she requested her child, Taylor D., be returned to her custody and an order terminating her parental rights to Taylor. She contends the court abused its

¹ Statutory references are to the Welfare and Institutions Code.

discretion by denying her section 388 petition, and she showed the beneficial parent-child relationship exception to termination of parental rights and adoption. We affirm the orders.

FACTUAL AND PROCEDURAL BACKGROUND

On October 13, 2006, the San Diego County Health and Human Services Agency (the Agency) petitioned on behalf of three-year-old Taylor under section 300, subdivision (b),² alleging Tammy used methamphetamine, was arrested for possessing the drug and drug paraphernalia in the room she shared with Taylor, admitted using methamphetamine two to three times each week and had a 16-year drug-use history.

Tammy submitted to the allegations. The court found them true and declared Taylor to be a dependent child of the juvenile court and placed him in foster care. It ordered Tammy to participate in services, including the Substance Abuse Recovery Management System (SARMS) program, parenting education and counseling, and ordered liberal supervised visitation.

Tammy did not actively participate in services, but she did visit Taylor. By the 12-month date, however, her visits became inconsistent, her housing was unstable, and she twice tested positive for methamphetamine and was twice terminated from SARMS. At the 12-month hearing on December 5, 2007, the court found reasonable services had

² On October 16, 2006, the court dismissed an allegation under section 300, subdivision (g).

been offered or provided, but Tammy had not made substantive progress. It terminated her services and set a section 366.26 hearing.

Tammy was arrested in April 2008 and, as an alternative to incarceration, began participating in the drug court program. She completed job readiness training and began full-time employment, out-patient treatment and participation in Narcotics Anonymous (NA). The social worker reported during the supervised visits she observed, Taylor and Tammy were affectionate with each other, but Taylor was not distressed at the end of visits. The social worker further reported Taylor was in good health and was charming and very intelligent and there were 20 approved adoptive families interested in adopting a child like him. In September 2008 he was moved to a potential adoptive home. During one subsequent visit with Tammy, Taylor remarked that he could not wait to change his last name to that of this family.

On September 15, 2008, Tammy petitioned under section 388, requesting the court place Taylor with her and vacate the scheduled section 366.26 hearing. She claimed she had been sober for nearly five months, had stable employment, lived in a sober living facility, was in the second phase of out-patient treatment, had been in therapy for four months, and was attending drug court and NA and regularly visiting Taylor.

At the combined sections 366.26 and 388 hearing on December 5, 2008, Tammy's drug abuse counselor testified Tammy had been his client for five months. He said she was complying with her program and drug testing. She was on the third step of a 12-step program and in a middle phase of an 18-month treatment program.

Tammy testified she had not used drugs since April 2008. She said she did not participate in services when they were first offered or visit Taylor regularly because of her methamphetamine addiction. She testified it was in Taylor's best interests to return to her because she was clean and sober. She told about a drug treatment program she had completed in the past, but said this time it was different because she was no longer in an environment where people used drugs.

After considering the evidence and argument, the court denied Tammy's petition. It found although she had shown changed circumstances, she did not show that placing Taylor with her would serve his best interests. The court terminated parental rights and referred Taylor for adoption, finding Tammy had not shown the beneficial parent-child relationship exception to adoption, and Taylor was likely to be adopted if parental rights were terminated and adoption was in his best interests.

DISCUSSION

I. Section 388 Petition

Tammy contends the court abused its discretion by denying her section 388 petition. She argues she showed changed circumstances and that it would be in Taylor's best interests to place him with her.

Section 388 provides in part:

"(a) Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court [¶] . . . [¶]

"(d) If it appears that the best interests of the child may be promoted by the proposed change of order . . . the court shall order that a hearing be held"

In order to gain the relief sought in a section 388 petition, the petitioner must show both a change of circumstances or new evidence and that the change sought is in the child's best interests. (§ 388; Cal. Rules of Court, rule 5.570(e); *In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.) A petition is liberally construed in favor of its sufficiency. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 461.) The petitioner bears the burden of proof, however, to make both showings. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

The court did not abuse its discretion by denying Tammy's petition. Assuming without deciding that substantial evidence supports the court's finding Tammy showed changed circumstances, we hold it did not abuse its discretion by finding she did not show that granting her petition would serve Taylor's best interests.

Tammy did not participate in services and made no effort to address her substance abuse problem during the entire reunification period. At the 12-month hearing the court terminated services. In April 2008 Tammy was arrested and began participating in drug court as an alternative to incarceration. She admitted to a 22-year drug abuse history and had participated in drug treatment before, but had gone back to using methamphetamine. She had been drug-free for only a few months, and it was unknown whether she would be able to maintain sobriety after she left her sober living environment. Also, she had been in therapy for only a short time and offered no documentation on her progress or testimony on what she had learned in therapy. She was not in therapy at the time of the

hearing, Further, the social worker assessed Taylor as adoptable and reported he and Tammy did not share a significant relationship. Tammy did not show it would be in his best interests to grant her petition and place him with her. The court did not abuse its discretion by denying Tammy's petition.

II. Beneficial Parent-Child Relationship Exception

Tammy asserts the court erred by terminating her parental rights because she visited Taylor consistently and maintained a significant and positive relationship with him throughout the dependency case.

Adoption is the permanent plan favored by the Legislature. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.) If the court finds by clear and convincing evidence that a child is adoptable, it becomes the parent's burden to show that termination of parental rights would be detrimental to the child because of a specified statutory exception to termination of parental rights and adoption. (*Id.* at p. 574.) Under the exception found in section 366.26, subdivision (c)(1)(B)(i), the parent is required to show that termination would be detrimental in that "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." In *In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534, the court noted "[c]ourts have required more than just 'frequent and loving contact' to establish the requisite benefit for [the] exception."

In reviewing whether there is sufficient evidence to support the trial court's finding, the appellate court reviews the evidence in the light most favorable to the court's

order, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.)

Assuming Tammy maintained regular visitation and contact with Taylor, she did not show her relationship with him was so beneficial that it would be detrimental to him to terminate her parental rights. Although they had enjoyable visits together, she did not occupy a parental role and by the time of the hearing, he had not relied on her for his daily needs for nearly two years. He showed no distress when parting from her at the end of visits. As the court noted, visitation remained supervised through Taylor's dependency. The court stated:

"The minor has never been on a day-to-day basis with [Tammy], nor has she ever provided any type of motherly relationship since the inception of this case that would lead the court to believe a parental relationship had existed between [Tammy] and Taylor at this point in time. [¶] . . . [¶] [Tammy] is just a friendly visitor in this case."

Taylor was eager to be with the family who wanted to adopt him and to call them "Mommy and Daddy." He said he wanted to change his name to theirs and to stay with them for "a thousand trillion days."

Tammy relies on *In re S.B.* (2008) 164 Cal.App.4th 289, a case from this court, to support her argument the court should have applied the beneficial parent-child relationship exception. In *In re S.B.*, we reversed the trial court's finding that the beneficial parent-child relationship exception did not apply after concluding the child would be greatly harmed by loss of the significant positive relationship she shared with her father. The father had complied with every aspect of his case plan, frequently visited his daughter and was devoted to her. She loved him and wanted to live with him. (*Id.* at

pp. 294-295.) Tammy did not make such a showing. Further, while factual comparisons between cases provide insight, these comparisons are not dispositive. The determination on appeal is whether there is substantial evidence to support the trial court's findings that the beneficial parent-child relationship exception did not apply. Here, the court's findings are fully supported.

DISPOSITION

The orders are affirmed.

O'ROURKE, Acting P. J.

WE CONCUR:

AARON, J.

IRION, J.